

THE MEANING OF RELIGIOUS PERSECUTION UNDER AMERICAN LAW: SUMMARY OF RELEVANT CASE LAW AND STATUTORY MATERIALS

An Overview for Immigration Judges

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May 15, 2018

CASE LAW SUMMARY

The Seventh, Ninth, and Eleventh Circuits agree on the legal definition of “persecution” for individuals seeking asylum on the basis of religious persecution. As the Seventh Circuit held in the leading case, it is a “clear error of law” to hold “that one is not entitled to claim asylum on the basis of religious persecution if * * * one can escape the notice of the persecutors by concealing one’s religion.” *Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004) (citations omitted); compare *id.*; *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 1453 (11th Cir. 2009) (“having to practice religion underground to avoid punishment is itself a form of persecution”); and *Zhang v. Ashcroft*, 388 F.3d 713, 719 (9th Cir. 2004) (per curiam) (“to require [a Falun Gong petitioner] to practice his beliefs in secret” to “avoid persecution” “is contrary to our basic principles of religious freedom and the protection of religious refugees”), with *Xue v. Sessions*, 846 F.3d 1099, 1108 (10th Cir. 2016), *cert. dismissed*, 138 S. Ct. 420 (2017) (requiring Xue to show more than a state “order[, under threat of penalty”—including physical abuse, four nights and three days of detention under “unsanitary conditions,” “a significant fine,” and “reeducation”—“to stop practicing [one’s] religion”), *cert. dismissed*, 138 S. Ct. 420 (2017). The notion that religious adherents are not persecuted if they may avoid governmental physical abuse, jail time, and state-imposed monitoring and indoctrination by practicing their faith alone and in private effectively reduces the concept of religious exercise to the freedom of thought and belief.

In particular, those circuits adhering to the majority rule hold that for an individual to be required to worship in secret satisfies the statutory criterion of “persecution” or “well-founded fear of persecution” based on religion. In a memorable passage, the Seventh Circuit in *Muhur* noted that “Christians living in the Roman Empire before Constantine made Christianity the empire’s official religion faced little risk of being thrown to the lions if they practiced their religion in secret.” *Muhur*, 355 F.3d at 960. But as the court recognized, “it doesn’t follow that Rome did not persecute Christians.” *Id.*

CONSTITUTIONAL, STATUTORY AND INTERNATIONAL AUTHORITIES

This majority rule and its definition of religious persecution is deeply rooted in the definitions of “religion” and “religious exercise” embedded throughout American and international law. These foundational laws with their robust, functional understandings of “religion” and “religious exercise,” include the following:

1. **First Amendment of the United States Constitution** protects the “free exercise of religion,” not just religious belief, and states:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I, cl. 1.

2. **Religious Freedom Restoration Act of 1993 (RFRA)**, 42 U.S.C. §§ 2000bb *et seq.*, protects “a person’s exercise of religion” from being “substantially burden[ed]” by any application of federal law *unless* the government demonstrates that it has a compelling governmental interest that cannot be achieved by a less restrictive means, and defines “exercise of religion” broadly, as follows:

42 U.S.C. § 2000bb-1(a): “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.”

42 U.S.C. § 2000bb-1(b): “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

42 U.S.C. § 2000bb-2(4): “[T]he term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title.” [See 42 U.S.C. § 2000cc-5 below, which provides that “[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”]

42 U.S.C. § 2000bb-3(a): “This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.”

3. **Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)**, 42 U.S.C. §§ 2000cc *et seq.*, protects houses of worship and other religious facilities, as well as federal, state, and local prisoners and other institutionalized persons, at the federal, state, and local level, from “a substantial burden on the religious exercise” *unless* the government demonstrates that it has a compelling governmental interest that cannot be achieved by a less restrictive means, and defines “exercise of religion” broadly, as follows:

42 U.S.C. § 2000cc-(a)(1): “No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.”

42 U.S.C. § 2000cc-(b)(3): “No government shall impose or implement a land use regulation that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”

42 U.S.C. § 2000cc-1(a): “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution * * *, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a

compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

42 U.S.C. § 2000cc-5(7): “(A) The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. (B) The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”

4. **Title VII of the Civil Rights Act of 1964**, 42 U.S.C. § 2000e *et seq.*, prohibits discrimination on the basis of race, color, national origin, sex, or religion, defining “religion” broadly, as follows:

42 U.S.C.A. § 2000e(j): “The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.”

5. **Office of the Attorney General, Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty, Oct. 6, 2017, 82 Fed. Reg. 49668 (Oct. 26, 2017):** Pursuant to Executive Order No. 13798 § 4, 82 Fed. Reg. 21675 (May 4, 2017), the Attorney General issued guidance interpreting religious liberty protections in federal law. The purpose of the memorandum and its appendix was “to guide all administrative agencies and executive departments in the execution of federal law.” 82 Fed. Reg. 49668. The guidance relied heavily on RFRA and RLUIPA and their broad definition of “religious exercise,” which includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 82 Fed. Reg. 49674, *citing* 42 U.S.C. § 2000bb-2(4); 82 Fed. Reg. 49675, *citing* 42 U.S.C. § 2000cc-5(7)(A).
 - “Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice.” 82 Fed. Reg. 49668.
 - “The Free Exercise Clause protects not just the right to believe or the right to worship; it protects the right to perform or abstain from performing certain physical acts in accordance with one’s beliefs. Federal statutes, including the Religious Freedom Restoration Act of 1993 (“RFRA”), support that protection, broadly defining the exercise of religion to encompass all aspects of observance and practice, whether or not central to, or required by, a particular religious faith.” *Id.*, ¶ 2.
 - “The Free Exercise Clause protects not just persons, but persons collectively exercising their religion through churches or other religious denominations, religious organizations, schools, private associations, and even businesses.” *Id.*, ¶ 3.

- “RFRA prohibits the federal government from substantially burdening a person’s exercise of religion, unless the federal government demonstrates that application of such burden to the religious adherent is the least restrictive means of achieving a compelling governmental interest. RFRA applies to all actions by federal administrative agencies, including rulemaking, adjudication or other enforcement actions, and grant or contract distribution and administration.” *Id.* at 49669, ¶ 10.
 - “Many, if not most, religious beliefs require external observance and practice through physical acts or abstention from acts. The tie between physical acts and religious beliefs may be readily apparent (e.g., attendance at a worship service) or not (e.g., service to one’s community at a soup kitchen or a decision to close one’s business on a particular day of the week). The ‘exercise of religion’ encompasses all aspects of religious observance and practice. And because individuals may act collectively through associations and organizations, it encompasses the exercise of religion by such entities as well.” *Id.* at 49672.
 - “The depth and breadth of constitutional and statutory protections for religious observance and practice in America confirm the enduring importance of religious freedom to the United States. They also provide clear guidance for all those charged with enforcing federal law: The free exercise of religion is not limited to a right to hold personal religious beliefs or even to worship in a sacred place. It encompasses all aspects of religious observance and practice.” *Id.* at 49680.
6. **Immigration and Nationality Act**, 8 U.S.C. §§ 1101 *et seq.*, protects persons who are unable or unwilling to return to a country “because of persecution or a well-founded fear of persecution on account of * * * religion,” and specifically states:

8 U.S.C. § 1101(a)(42): “The term ‘refugee’ means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”

8 U.S.C. § 1158(b)(1)(B)(i): “The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section,

the applicant must establish that race, *religion*, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason for persecuting the applicant.*” (Emphasis supplied.) See <https://www.justice.gov/eoir/immigration-judge-benchbook-section-241b>.

8 C.F.R. § 1208.13(b): “(b) The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution. (1) An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.

7. **International Religious Freedom Act of 1998**, 22 U.S.C. §§ 6401 *et seq.*, was a response to increased religious persecution around the globe. It establishes the infrastructure for advancing religious freedom as American foreign policy and for protecting individuals who are being persecuted because of their religion. Several of its provisions address religious persecution, including:

22 U.S.C. § 6401(a)(1): “The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.”

22 U.S.C. § 6401(a)(4): “The right to freedom of religion is under renewed and, in some cases, increasing assault in many countries around the world. More than one-half of the world's population lives under regimes that severely restrict or prohibit the freedom of their citizens to study, believe, observe, and freely practice the religious faith of their choice. Religious believers and communities suffer both government-sponsored and government-tolerated violations of their rights to religious freedom. Among the many forms of such violations are state-sponsored slander campaigns, confiscations of property, desecration of cemeteries, surveillance by security police, including by special divisions of ‘religious police’, severe prohibitions against construction and repair of places of worship, *denial of the right to assemble and relegation of religious communities to illegal status through arbitrary registration laws*, prohibitions against the pursuit of education or public office, and prohibitions against publishing, distributing, or possessing religious literature and materials.” (Emphasis supplied.)

22 U.S.C. § 6401(a)(5): “Even more abhorrent, religious believers in many countries face such severe and violent forms of religious persecution as detention, torture, beatings, forced marriage, rape, imprisonment, enslavement, mass resettlement, and death merely for the peaceful belief in, change of or practice of their faith. *In many countries, religious believers are forced to meet secretly*, and religious leaders are targeted by national security forces and hostile mobs.” (Emphasis supplied.)

22 U.S.C. § 6401(b)(1)(A): “The following shall be the policy of the United States: (A) To condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental right to freedom of religion.”

22 U.S.C. § 6401(b)(1)(C): “The following shall be the policy of the United States: * * * (C) To be vigorous and flexible, reflecting both the unwavering commitment of the United States to religious freedom and the desire of the United States for the most effective and principled response, in light of the range of violations of religious freedom by a variety of persecuting regimes, and the status of the relations of the United States with different nations.”

22 U.S.C. § 6401(b)(1)(E): “The following shall be the policy of the United States: * * * (E) Standing for liberty *and standing with the persecuted*, to use and implement appropriate tools in the United States foreign policy apparatus, including diplomatic, political, commercial, charitable, educational, and cultural channels, to promote respect for religious freedom by all governments and peoples.” (Emphasis supplied.)

22 U.S.C. § 6402(16): “The term ‘violations of religious freedom’ means violations of the internationally recognized right to freedom of religion and religious belief and practice, * * * including violations such as (A) arbitrary prohibitions on, restrictions of, or punishment for (i) *assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements*; (ii) *speaking freely about one's religious beliefs*; (iii) changing one's religious beliefs and affiliation; (iv) not professing a particular religion, or any religion; (v) possession and distribution of religious literature, including Bibles; or (vi) raising one's children in the religious teachings and practices of one's choice; or (B) any of the following acts if committed on account of an individual's conscience, non-theistic views, or religious belief or practice: *detention, interrogation, imposition of an onerous financial penalty*, forced labor, forced mass resettlement, imprisonment, forced religious conversion, forcibly compelling non-believers or non-theists to recant their beliefs or to convert, beating, torture, mutilation, rape, enslavement, murder, and execution.” (Emphasis supplied.)

22 U.S.C. § 6412(b)(1)(B): The Annual Report on International Religious Freedom is to contain “[a]n assessment and description of the nature and extent of violations of religious freedom in each foreign country, including persecution of one religious group by another religious group, religious persecution by governmental and nongovernmental entities, persecution targeted at individuals or particular

denominations or entire religions, * * * the existence of government policies violating religious freedom, including policies that discriminate against particular religious groups or members of such groups, *policies that ban or restrict the public manifestation of religious belief* and the peaceful involvement of religious groups or their members in the political life of each such foreign country and the existence of government policies concerning (i) *limitations or prohibitions on, or lack of availability of, openly conducted, organized religious services* outside of the premises of foreign diplomatic missions or consular posts * * * .” (Emphasis supplied.)

22 U.S.C. § 6473(c): “The Executive Office of Immigration Review of the Department of Justice shall incorporate into its initial and ongoing training of immigration judges training on the extent and nature of religious persecution internationally, including country-specific conditions, and including use of the Annual Report. Such training shall include governmental and nongovernmental methods of persecution employed, and differences in the treatment of religious groups by such persecuting entities.”

22 U.S.C. § 6482(b)(1): United States institutions of higher education operating campuses in other countries should “uphold the right of freedom of religion of their employees and students, including *the right to manifest that religion peacefully* as protected in international law.” (Emphasis supplied.)

8. **Universal Declaration of Human Rights (UDHR)** was adopted by the United Nations in 1948 in response to the genocide and other atrocities, including those based on religion, committed during World War II. It broadly protects “the right to freedom of thought, conscience and religion.” More specifically, it protects freedom of religion “in community with others and in public * * * in * * * practice, worship and observance,” as follows:

Art. 18: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

9. **International Covenant on Civil and Political Rights (ICCPR)** is a multilateral treaty, adopted in 1966 by the United Nations and becoming effective in 1976, that is a binding commitment among the signatory nations to protect various fundamental human rights, including “freedom of thought, conscience and religion.” Patterned after UDHR Article 18, the ICCPR also broadly protects “the right to freedom of thought, conscience and religion.” Specifically, it protects freedom of religion “in community with others and in public * * * in * * * worship, observance, practice and teaching,” as follows:

Art. 18, cl. 1: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

Art. 18, cl. 2: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

Art. 18, cl. 3: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

10. **U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* 126 (Dec. 2011):** “[O]ne *should not be compelled to hide* * * * in order to avoid persecution,” and “[b]earing witness in words and deeds is often bound up with the existence of religious convictions.”